"4. The High Court shall have power, upon the application of any person who alleges that his interests have been prejudicially affected, to declare that exclusive privileges and rights in a design have not been acquired in the Federation under the provisions of this Ordinance upon any of the grounds upon which the United Kingdom registration might be cancelled under the law for the time being in force in the United Kingdom".

It will be seen therefore that by virtue of section 4 of the Ordinance the High Court has power, upon the application of any person who alleges that his interests have been prejudicially affected, to declare that exclusive privileges and rights in a design have not been acquired in the Federation under the provisions of the Ordinance upon any of the grounds upon which the United Kingdom registration might be cancelled under the Act. It will be seen from subsection (2) of section 11 that the registrar may cancel the registration on the ground, *inter alia*, that the design was not, at the date of the registration thereof, new or original. From the wording of subsection (2) of section 1 I think it is clear that if an article is the same as a design which before the date of the application for registration has been registered or published in the United Kingdom it is not a design which is new or original. The question therefore is whether or not the design of a stool made by the plaintiff is an article which is the same as a design which was published (there is no question here of prior registration) before the date of the application for registration.

Broadly speaking, there is publication if the design has been disclosed to the public as opposed to being kept secret. The question which has to be decided is, therefore, has the public been put in possession of the design? Has it knowledge of the design? It is not necessary that the design should have been actually used. There will just as much be publication if it is shown that it was known to the public, without ever having been actually put in use. Thus publication may be of two types, (a) publication in prior documents, (b) publication by prior user. (See *Russell-Clarke's* Copyright in Industrial Designs, 3rd edition, page 39).

There will be publication if articles to which the design is applied are manufactured and used in such a way that members of the public may see them. It is not necessary that the prior user should have been sold, although, if there is anything in the nature of profitable user by the owner of the design prior to registration, there will undoubtedly be publication. (See page 45 of *Russell-Clarke, supra*).

As I have already said above, evidence which was not contradicted, and in fact not substantially contested by the plaintiff at all, was led to show that stools substantially similar to those which were manufactured to the design which has been registered had been made by the defendant and sold to the public, presumably at a profit, in considerable quantities, either directly or through the furniture dealers over a period of 5 years prior to the registration of the design. It seems to me that this constitutes publication of the design prior to the date of registration. In these circumstances it is in my view a design which is not new or original. It is pleaded in paragraph 4 of the defence that the design was not new or original. Paragraph 4 of the defence is repeated in paragraph 10 of the Counterclaim. That being the case the defendant is entitled to the declaration for which he is asking in his Counterclaim, and the plaintiff's claim must fail.

The plaintiff's claim is therefore dismissed with costs, and there will be judgment for the defendant on the counterclaim as prayed with costs.

Claim dismissed.

Solicitors: *Presgrave & Matthews; Lim, Lim & Oon.*

TRENGGANU LAND DEVELOPMENT BOARD. KUALA TRENGGANU v. TALIB

[C.A. (Thomson C.J., Syed Sheh Barakbah and Azmi JJ.) December 12, 1961]

[Kuala Trengganu — F.M. Civil Appeal No. 18 of 1961]

Contract — Special provisions as to settlement of dispute by arbitrator — Whether appointment of arbitrator proper — Trengganu Land Development Board — Whether board validly existed though appointment expired on 27.11.60.

Practice and Procedure — Whether service of Originating Summons was good under O.9 r.8(2).

On April 7, 1960 the appellant Board entered into a contract with the respondent for the clearing of 1,400 acres of land. The contract was in the English language and clause 40 provided that in the event of any dispute or difference between the parties such dispute or difference would, subject to certain conditions be "referred to the arbitration and final decision of a person nominated and appointed by agreement between the Chairman (of the Board) and the Contractor." The respondent proceeded to carry out a certain amount of work but ultimately disputes arose as to the extent of work and amount of payment. Preliminary steps, as provided in the agreement, were taken and letters in Malay were exchanged between the parties before the arbitrator entered upon his reference and made his award in favour of the defendant for a sum of $162,398.30 for work done under the contract. As payment of the said sum was not forthcoming the respondent issued an Originating Summons against the Board asking for leave to enforce the award as a judgment of the Court. Hepworth J. made an order as prayed. The Board now appealed. It was argued for the appellant that the appointments of all persons appointed to constitute the Board in 1959 expired on November 27, 1960 and that no order had yet been made appointing another Chairman and other members to constitute the Board and in consequence there was no validly appointed Chairman who could appoint an arbitrator. It was also argued that the trial Judge erred in law in holding that the service of the Originating Summons was good under the provisions of O.9 r.8(2) of the Rules of the Supreme Court and that there was a valid appointment of an arbitrator who could make a valid award against the respondent.

Held: (1) despite the fact that no appointments were made to the Board, it continued to exist after November 27, 1960 and therefore an appointment of arbitrator made by the Board's Chairman was a valid appointment;

(2) O.9 r.8(2) clearly covered the service in the present case;

(3) the arbitrator was named by the Chairman on November 27 that is the last day of the Chairman's tenure of office. As the Board continued in existence after November 27 it cannot be said any further act is necessary to make the appointment of the arbitrator effective.

Case referred to:—

(1) *Mahony* v. *East Holyford Mining Co.* (1875) 7 H.L.C. 869, 893.

CIVIL APPEAL.

R. H. V. Rintoul for the appellant.

Maidin bin Mohd. Ibrahim for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal by the Trengganu Land Development Board, which I shall call "the Board", against an Order of Hepworth J., by which he gave leave to one Talib bin Mat Diah, whom I shall call "the Contractor", to enforce an arbitration award as a judgment of the Court. At the outset I wish to say that we have had to listen to some arguments which, speaking for myself, I find very unattractive and which reflect little credit on those who instructed counsel to put them forward.

The appellant Board was set up under the Land Development Ordinance, 1956. That Ordinance provides for the establishment of local development boards and also of what it calls "corporations". By section 30 the Ruler-in-Council in a State may establish Boards for any area in such State and by section 39 he may appoint a Chairman and members of such a Board for such term as he may determine. By section 44 every such Board "shall be a body corporate.....and shall have perpetual succession and may sue and be sued". A Board has power to do whatever it may consider convenient or necessary to do in discharging the purposes of the Ordinance (section 30) which in the preamble are said to include land development and settlement. Provision is made for furnishing Boards with funds (section 32) and they have power to appoint officers and servants (section 34).

It was in accordance with these provisions that the Trengganu Land Development Board was established in 1957. It was originally known as the "Land Development Board, District of Besut" and was established by the Ruler-in-Council of the State of Trengganu by an Order dated 11th May, 1957 (*Gazette* Notification No: 376). That Order provides *inter alia* that the Board shall be a body corporate and may sue and be sued in its corporate name and shall have perpetual succession and may enter into contracts. It is to consist of a Chairman and such members as may be appointed by the Ruler-in-Council. The quorum at all meetings of the Board is to be four and it is provided that the Board may act notwithstanding any vacancies in its membership. In 1958 the name of the Board was changed to "The Trengganu Land Development Board" (*Gazette* Notification No: 17).

On 14th March, 1959, the Commissioner of Lands and Mines, Trengganu, as Chairman and seven other persons as members were appointed to constitute the Board "for a term of one year with effect from 29th November, 1958, inclusive". The appointment of these persons came to an end on 28th November, 1959, and on 22nd August, 1960, that is to say about nine months later, the Commissioner of Lands and Mines, Trengganu, as Chairman and seven other persons, not all of them the same as the persons previously appointed as members, were appointed to constitute the Board "for a term of twelve months with effect from 28th November, 1959, inclusive". It may be that in this Order "28th" is a clerical error for "29th"; nevertheless there is nothing to show that there has in fact been a clerical error and we thus have the curious result that on 28th November, 1959, the same Board was constituted in two different ways. It is fortunate that the conclusions at which I have arrived regarding this case make it unnecessary for me to examine the legal effects of this curious piece of legal schizophrenia.

On 7th April, 1960, the Board entered into a contract with the Contractor, which is called "Contract No. 1 of 1960", for the clearing of about 1,400 acres of jungle in connection with the Chalok Land Development Scheme. That contract is in writing in the English language and nothing turns on any of its terms except clause 40 which provides that in the event of any dispute or difference between the parties such dispute or difference shall, subject to certain conditions, be "referred to the arbitration and final decision of a person nominated and appointed by agreement between the Chairman (of the Board) and the Contractor".

The Contractor proceeded to carry out a certain amount of work under the contract but ultimately disputes arose as to the extent of that work and as to what he was entitled to by way of payment. The preliminary steps provided for by the agreement were taken and then on 27th November, 1960 (the date is important) the Chairman addressed a letter in the Malay language to the Contractor. The material portion of that letter reads as follows:—

"Saya telah berchadang supaya Pegawai Hutan Negeri atau wakil-nya menjalankan pepereksa'an peker-ja'an tuan di-Chalok, menurut Fasal 40, Perjanjian Contract No. 1/1960."

The following day the Chairman addressed the following further letter to the Contractor:—

"Berhubong dengan surat saya bertarikh 27.11.1960 melantekkan Pegawai Hutan Negeri atau wakil-nya untok menjalankan pepereksa'an contract tuan menurut Fasal 40 Perjanjian Contract No. 1/1960, maka saya harap dapat ketahwi sama-ada kelantekan saya itu di-persetujui oleh tuan atau tidak."

The same day the Contractor replied to the Chairman's second letter as follows:—

" Saya rojo'kan kapada surat tuan 24/57/Pt. 12/SJ. (1) bertarikh 28.11.1960, maka dengan ini saya ma'-alumkan ia-itu saya bersetuju dengan kelantek tuan itu menurut Fasal 40 Contract Agreement 1/1960."

When documents in two different languages have to be construed together there is always the possibility of difficulty. Here, however, it has not been questioned that the letters which have been quoted read with Clause 40 of the contract of 7th April, 1960, constituted a good submission to arbitration of the disputes that had arisen between the parties except in one respect with which I shall deal later.

The arbitrator entered upon his reference immediately and on 11th December, 1960, he made an award in which he found that there was due to the Contractor a sum of $162,398.30 for work done under the contract.

Nothing was done about this award for some time and on 16th March, 1961, the Contractor's pleader addressed a letter to "The Chairman, Trengganu Land Development Board" demanding payment of the sum awarded by the arbitrator together with a sum of $9,023 which the Contractor had made as deposit under the terms of the original contract. In reply he received a letter dated 22nd March, 1961, and signed by a functionary who described himself as "Commissioner of Lands and Mines, (Chairman, Trengganu Land Development Board, Trengganu)" which stated that the question of payment to the Contractor "is still under consideration".

The matter would appear to have remained under consideration and on 19th April, 1961, the Contractor's pleader issued an Originating Summons against the "Chairman, Trengganu Land Development Board" as respondent asking for leave to enforce the award of $162,398.30 made by the arbitrator. This Summons was served on the functionary who signed the letter of 22nd March, 1961, who is described in the return of service both by name and as "Chairman, Trengganu Development Board".

The Summons came on for hearing before Hepworth J. in Chambers on 3rd May, 1961, when the Commissioner of Lands and Mines, who was then a different person, appeared for the respondent. He took an objection to the service of the Summons, which was over-ruled. I will deal with this point later. He then said that "the respondent" objected to the enforcement of the award because the arbitrator had reached his conclusions "without making sufficient enquiries and did not follow the terms of the contract". On that he asked for an adjournment to obtain advice. Not surprisingly Hepworth J. refused an adjournment. He pointed out that the respondent had had ample time to take steps to have the award set aside and right down till that very day no such steps had been taken. He then made an Order as prayed for in the Originating Summons.

On 7th May a notice was filed signed by somebody who described himself as "defendant abovenamed" applying for the adjournment of the matter into Court for further argument. The Judge certified that he required no further argument and on 23rd May, 1961, Notice of Appeal was filed in the following terms:—

" TAKE NOTICE that THE TRENGGANU LAND DEVELOPMENT BOARD being dissatisfied with the decision of the Honourable Mr. Justice T. R. Hepworth given at Kuala Trengganu on the 3rd day of May, 1961 appeals to the Court of Appeal against the whole of the said decision.

Dated this 23rd day of May, 1961.

Sd. Tengku Mahmud
Appellant."

It is, I think, common ground that Tengku Mahmud by whom that notice was signed was, when he signed it, Commissioner of Lands and Mines.

On the same day a Notice of Appointment of Solicitors was filed stating that the solicitors named had been appointed by "the appellant abovenamed", that is the "Trengganu Land Development Board". At the same time the usual deposit of $500 was paid into Court, it is not clear by whom.

On 8th July the "Chairman, Land Development Board" filed a notice appointing new solicitors.

At the hearing of the appeal all the grounds of appeal which had been stated in the Memorandum of Appeal were withdrawn except two. These are as follows:—

" The learned trial Judge erred in holding that the provisions of Order 9 Rule 8(2) of the Rules of the Supreme Court, 1957 applied to these proceedings.

The learned trial Judge erred in arriving at the conclusion that there was a valid appointment of an arbitrator, who could make a valid award against the respondent."

I will deal with these two grounds of appeal separately. The argument for both of them, however, arises from the facts that the appointments of all the persons appointed to constitute the Board in 1959 expired on 27th November, 1960, and that no order has yet been made appointing another Chairman and other members to constitute the Board. It was said to follow that at all times subsequent to 27th November the Board, although not extinguished or dissolved, has been in some sort of state of suspended existence and in consequence it has not been capable of doing anything in pursuance of the objects for which it was created. In particular, after 27th November, 1960, there has been no Chairman who could appoint an arbitrator under the contract of 7th April, 1960, or who as principal officer is capable of being served with process of the Court.

To my mind a short answer to all this is to be found in the rhetorical question of Pleader Maidin: "Who, then, is the appellant?". If, forensically speaking, the Board after 27th November, 1960, has been so completely devoid of life and capacity for action as is argued then *ex hypothesi* it has been incapable of opposing the Contractor's application to enforce the arbitration award or of instructing solicitors or of appealing against any judgment or order that may have been obtained against it. It certainly cannot behave like some forensic Cheshire cat which at one moment is there and the next moment is not there as best suits itself. Such would appear to be the commonsense view of the matter.

It is true that the Board is not a corporation in the restricted statutory sense in which that word is used in the Land Development Ordinance where the word is used as a label for a different sort of body but it is clearly a corporation aggregate in the eyes of the law in the sense that it has a legal *persona* of its own which is distinct from and in no way connected with the legal personalities of the persons who are from time to time its members. But while it is clear enough, and indeed has not been questioned, that the Board continues to exist irrespective of whether or not it has for the time being a Chairman and members it is by no means clear just what it can and cannot do in the absence of a Chairman and members and the complete answer to that question is not to be found within the four walls of the Ordinance, although section 66 of the Ordinance reads as follows:—

> "No act done or proceeding taken under this Ordinance shall be questioned on the ground —
>
> (a) of the existence of any vacancy in the membership of, or any defect in the constitution of, the Authority or any board or corporation; or
>
> (b) of any omission, defect or irregularity not affecting the merits of the case."

The truth is that we are in a state of something like darkness as to what Lord Hatherley has called "the indoor management" of the Board as distinct from its "external position" (see *Mahony* v. *East Holyford Mining Co.*[1]). At no time has anybody connected with the Board seen fit to go on affidavit and clearly it is not a subject on which the Contractor can be expected to have any great knowledge. Nor is any very valuable guidance to be derived from a consideration of the mass of learning contained in the reported cases mentioned in the title "Corporations" in *Halsbury's* Laws of England to which we were referred. What the Banbury Corporation or the Governors of the Colchester Grammar School could or could not do in the 18th century when the natural persons who were members of these corporations ceased to exist has little bearing on what a modern statutory board can or cannot do in similar circumstances.

Given, however, the continued existence of the Board the actual grounds of appeal can be dealt with shortly.

As regards the appointment of the arbitrator, the contract provides that he is to be "nominated and appointed by agreement between the Chairman and the contractor". In actual fact he was named by the Chairman on 27th November, that is the last day of the Chairman's tenure of office as such. It is to be observed that the contract was between the Contractor and the Board and not between the Contractor and the Chairman. The Board continued in existence after 27th November and it cannot be said that after writing the letter of 27th November nominating the arbitrator there was anything further that required to be done by the Chairman as Chairman to make the appointment of the arbitrator effective.

With regard to the second ground of appeal, it is said the trial Judge was wrong in holding that the service of the Originating Summons on the Chairman of the Trengganu Development Board was good by reason of the provisions of Order 9 rule 8(2). The relevant portion of that rule provides that in the case of an action against "any Board constituted by any written law, not being a corporation" process may be served on the "Principal Officer or Secretary thereof". The appellant's argument, as I understand it, is that by reason of section 44 of the Ordinance the Trengganu Land Development Board is a corporate body. It cannot therefore be described as a Board "not being a corporation" and so the rule does not apply to the question of service in the case of proceedings against it. The point is almost trivial because by the previous sub-rule in the case of an action against a corporation process may be served by handing a copy to "the secretary or to any director or other principal officer of the corporation". To my mind these words clearly cover the service in the present case.

I would dismiss the appeal with costs. The respondent may have some difficulty in any further proceedings he may see fit to take particularly if it is true that the total funds of the Board, as we were told, amount to $17. At any rate he can have the $500 which has been deposited in Court by somebody as security for the appeal costs.

Syed Sheh Barakbah J.: I have had the advantage of reading the judgment of the learned Chief Justice with whose views I find myself in entire concurrence. I would therefore dismiss the appeal with costs and order payment out of the deposit of $500 in the Court to the respondent.

Azmi J.: I have had the advantage of reading the judgment of My Lord the Chief Justice. I am in agreement with the views expressed in it and that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Maidin bin Mohd. Ibrahim.*